United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 75-4240

United States Court of Appeals

FOR THE SECOND CIRCUIT

NEW YORK PRINTING PRESSMEN AND OFFSET WORKERS UNION NO. 51, INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATION UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably concluded that the record in this case provides an insufficient basis for finding that the Company violated Section 8(a)(5) and (1) of the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of New York Printing Pressmen and Offset Workers Union No. 51, International Printing and Graphic Communication Union, AFL-CIO (hereinafter "the Union") to review an order of the National Labor Relations Board dismissing a complaint against Milbin Printing, Inc., Morlain Press, Inc., Pressure Sensitive Tape and Label Corp., MCM Advertising, Inc., and Cortney Press, Inc. (hereinafter collectively "the Company"). The Board's decision and order was issued on June 4, 1975, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) and is reported at 218 NLRB No. 29 (A. 15a-26a).[1] This Court has jurisdiction under Section 10(f) of the Act.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company entered into negotiations with the Union in good faith and continued to so bargain. Thus, the Board dismissed in its entirety a complaint alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to furnish financial records to the Union, by unjustifiably shifting its bargaining stance regarding a union security clause, and by granting a wage increase to its employees. The evidentiary basis for the Board's findings is as follows:

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[1] "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

A. Background: collective bargaining meetings begin; the parties agree on 35 contract clauses "in principle" and the Company subsequently advises the Union that one such clause, union security, is still an open issue.

The Company is engaged in the printing, sale, and distribution of forms, labels and related products (A. 15-16a, 29a). It is wholly-owned by four Cooper brothers, one of whom, Daniel Cooper, is Company president (A. 30a and n. 7; 89a, 193a-194a, 198a). On October 10, 1972, after a Board-conducted election, the Union was certified as the exclusive bargaining representative for the Company's production employees (A. 30a; 56a). During the following year the Company and the Union engaged in 21 separate negotiating sessions (A. 30a; 51a).

At the first bargaining session on October 26, 1972, Union Business Representative Julius Seide and Union negotiator Jack Devins presented the Union's master contract to President Cooper (A. 30a; 55a, 143a-144a, 205a). The parties generally reviewed the language of the Union's proposal on November 8 and 29, 1972, and agreed on December 14 to defer discussion of financial figures until Company accountants had completed the year-end audit (A. 30a, 31a; 57a-62a, 64a).

On January 16, 1973,[2] Union negotiators Seide and Devins made their first wage proposal, asking that the unit employees receive a 10 percent increase in salary for each of the three years following execution of a contract plus welfare benefits of 4.11 percent of the payroll (A. 31a; 65a, 148a). Cooper countered with a proposal for a 2 percent salary increase over an 18-month period plus Union utilization of the Company's current payment of 6.9 percent of gross payroll for welfare

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[2] Unless otherwise noted, all dates hereinafter are in 1973.

and pension purposes (A. 31a; 66a-67a). Seide rejected Cooper's offer and the parties then discussed other areas of the master contract (A. 31a; 67a). Cooper told Seide that the Company "might agree" to a union security clause if and when agreement was reached on financial matters (A. 17a, 32a-33a; 112a-113a).[3] The parties concurred "on a great deal of language," and at the end of the meeting Cooper and Seide signed a one-page statement listing 35 sections of that master contract that they agreed to "in principle" (A. 31a; 67a, 149a, 173a, 206a).

Two days later, on January 18, Company President Cooper sent Seide and Devins the following letter (A. 32a; 67a-68a, 150a, 210a-211a):

> You're a great pair of bargainers, but you've gotten me in an awful mess with my brothers and I have to make some changes in what we discussed earlier.
>
> We had a meeting yesterday to review everything that took place at our bargaining session on Tuesday. They feel I did more than they had authorized me to do and to quote one of them, I had "given away the Company" by agreeing in principle to so many recommendations. We had a bad time, but I was finally able to convince them to go along with everything with one exception.
>
> The one exception is that the Company cannot and does not agree at this time to give you a guaranteed union membership for all the employees until we agree on the monetary issues. As one of my brothers put it, and I now have to agree, having thought out the matter further, that it is probably one of the most important issues to the Union and it should

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[3] Although Seide insisted at the hearing that Cooper unconditionally promised on January 16 that "he would give us union security," the Administrative Law Judge discredited his testimony on the basis of his prior inconsistent statement (A. 17a, 32a-33a).

not be given until we first have an agreement from you regarding our economic situation that is satisfactory to us. Therefore, Section 3 of the contract, which requires everyone to be in the Union, is an open issue until we reach agreement on the economics.

I am sorry to have to do this, but I must if I am to be able to live with my brothers and be able to negotiate with you. Since we have made such headway on all of the other parts of the agreement, which includes areas concerning the holiday and the death leave, I am sure we can make progress on the remaining matters as long as you will agree to be reasonable about the economics.

I look forward to your coming up with some new proposals that are more in line with our company's situation. Please excuse me for this, but you can blame it on your own persuasiveness – I opened my mouth before I realized what I was doing.

Thank you in advance for being fair and considerate.

B. Collective bargaining meetings continue; the Company tells the Union that it "can't reach [the Union's] numbers" and the Union demands to see Company books.

At the next negotiating session on January 25, Cooper stated that he "couldn't reach [the Union's] numbers, . . . meaning the proposal that [the Union] had made" earlier because the Company "had to keep things in proper balance" (A. 33a; 68a, 77a, 110-111a). Seide told Cooper "that if he couldn't reach our numbers and the Company couldn't do it, if we could see the books at that time we would then tailor a contract to fit his . . . financial ability to pay" (A. 33a; 68a, 152a). Cooper responded that "I'm not here to show you my books" because "it was nobody's business to see the books" (A. 33a; 68a-69a, 152a). Both Union negotiators admitted that Cooper never claimed the Company

could not afford to pay more in wages and fringe benefits, nor ever claimed that "business was bad" (A. 33; 111a, 110a, 152a-153a, 203a). As the session proceeded Cooper made a new wage offer greater than the one previously proffered the Union, and the Union countered by reducing its demands on this issue (A. 33a; 69a, 207a-209a). Agreement was reached on other terms which Seide reduced to writing but which Cooper refused to sign until the entire contract was finalized (A. 33a; 69a-70a).

The parties met on February 6 and 15 with no change in bargaining position (A. 33a; 71a-75a). Cooper reiterated that he "couldn't reach" the Union's "numbers," and Seide replied that he wanted to see the Company's books (A. 33a; 71a). On March 8, the Union proposed an 18-month contract with 3 periodic wage increases of 8 rather than 10 percent and compromised on sick pay and jury duty (A. 33a; 72a-73a, 75a). On March 21, the Company countered with two periodic wage increases of 2.5 percent plus 6.9 percent in welfare benefits over a 21-month contract, which the Union rejected (A. 77a-78a). On March 27, the Union lowered its wage demands to an initial 7.5 percent increase plus two periodic 6 percent increases and changed the contractual format (A. 34a; 81a-82a). Cooper again alleged that the "numbers" were "too steep" and refused to show his books (A. 34a; 82a-83a).

The parties met again on April 3 (A. 34a; 83a). The Union asked for another Company offer, and Cooper replied that he and his brothers had talked it over and "there would be no other offer at this time" (A. 34a; 84a-85a). Seide accused the Company of bargaining in bad faith and, as a bargaining tactic, the five Union members sat silently at the bargaining table for 30 minutes and more, until Cooper asked them to leave (A. 34a; 85a-86a). At the next session on April 23, the parties reviewed the Company and Union proposals (A. 34a; 86a). After some discussion Cooper proposed two periodic wage increases of 3 percent,

but reduced his welfare offer, and said he had talked it over with his brothers and this was the best they could do (A. 34a; 86a-88a). When Seide requested that the Cooper brothers be brought in to negotiate, Daniel Cooper insisted that he was the sole negotiator, and raised his wage offer to 3.5 percent (A. 35a; 88a-90a).

C. The Union pickets; the parties reach agreement on all issues except union security.

On May 15, the parties met with Ben and Jack Cooper, who assured the Union that Daniel was the sole Company negotiator (A. 35a; 90a-91a). Seide asked about the last Union proposal and Daniel Cooper replied that he "couldn't reach" those numbers, that he "couldn't give [the Union] any more" (A. 35a; 91a). The next morning, May 16, the Union struck the plant (A. 35a; 93a-95a). Six employees picketed while 18 crossed the picket line and worked in the plant (A. 35a; 95a, 191a).

The parties met to negotiate on June 19 (A. 37a; 96a). The Union proposed a 7.5 percent wage package; the Company's counterproposal included an initial wage raise of 5 percent and another 5 percent spread over a 12-month period (A. 37a; 97a-98a). Other items were then discussed and, after a caucus between Seide and Devins, the Union officials decided to accept the Company's proposal (A. 37a; 98a-99a). After Seide had so informed Cooper, the subject of union security arose (A. 37a; 99a, 157a, 162a). Cooper told Seide that he refused to include a union security clause in the contract because he had 18 employees working inside the plant who had told Cooper "one by one, that they don't want to have anything to do with [the Union]" (A. 37a; 99a). According to Cooper, he "couldn't see forcing anybody to pay dues or . . . tribute, to . . . any organization if the people themselves didn't want to" (A. 37a; 160a-162a, 99a-100a). The meeting ended abruptly (A. 37a; 100a, 161a).

D. The parties negotiate to impasse; the Company institutes a wage increase.

Seide and Cooper met next on July 5, at which time the Union lowered its wage demands and made other proposals, including an agency shop clause (A. 39a; 101a-102a). Cooper commented that Seide "was now talking in his ballpark" and promised to review the Union's offer but called Seide later to say that an agency shop was unacceptable to him (A. 39a; 103a). Cooper reiterated that due to "the fact that we have 18 in and you have only 6 out [on the picket line], I'm not going to give you the union security" and proposed that the striking employees return to work and negotiations be resumed (A. 39a; 103a). The parties met on July 26 to explore that possibility, but the strikers refused to return to their jobs without a union security clause and Seide so informed Cooper (A. 39a; 103a-104a).

On September 11, at the next bargaining meeting with Cooper, Seide brought up for the first time such items as a Christmas bonus, a Union bulletin board, and clarification of the Company's hiring and subcontracting procedures (A. 39a; 168a, 214a-218a). Seide admitted that he "would not have presented [the new demands] normally" but did so to demonstrate that the parties were not at impasse (A. 39a, n. 12; 116a). The next meeting was arranged through the Federal Mediation and Conciliation Service and was held on September 24 (A. 39a-40a; 167a). A few of the items proposed by the Union were agreed upon (A. 40a; 167a-168a). The Union advanced, and the Company agreed to consider, a modified maintenance of membership union security clause whereby current employees would not have to join the Union but future hires would be compelled to do so (A. 40a; 168a-169a). At the parties' next meeting before the mediator on October 3, the Union made a new financial offer and the Company countered with a package including a 5 percent

wage increase retroactive to August 1 and a form of maintenance of membership clause which Seide rejected (A. 40a; 169a-170a, 107a).

The final bargaining meeting took place on October 10. Company Attorney Husband informed the Union that the Company's October 3 offer was a final offer, and that he would recommend to the Company that the offer, including the 5 percent wage increase, be effectuated immediately (A. 40a; 106a-108a). The Union objected, stating that the parties still had some negotiating to do (A. 40a; 108a). Nevertheless, on October 12, the Company instituted the wage increase for all its employees, effective August 1 (A. 40a; 117a).

On November 2, the Union advised the Company that it wished to continue negotiations (A. 40a; 109a, 219a). On November 8, Company Attorney Husband replied that Company doubted the Union's majority status and refused to bargain unless the Union presented convincing proof of such status (A. 40a; 109a, 220a).[4] No further negotiations occurred (A. 40a; 109a).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board concluded, in agreement with the Administrative Law Judge, that the Company entered into negotiations with the Union in good faith, that it continued so to bargain at all times material, and hence that it did not violate Section 8(a)(5) and (1) of the Act (A. 16a, 42a). Accordingly, the Board dismissed the complaint in its entirety (A. 20a, 42a).[5]

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[4] About October 1, several Company employees filed a decertification petition with the Board (A. 40a, n. 13).

[5] Member Jenkins, dissenting, would find that the Company violated Section 8(a)(5) and (1) (A. 21a-26a).

ARGUMENT

THE RECORD DOES NOT COMPEL THE CONCLUSION THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

As shown, the Board found that the Company bargained in good faith and accordingly dismissed the complaint. The Union seeks review of this action, contending that the Company violated Section 8(a)(5) and (1) of the Act by refusing to disclose its financial records, by unjustifiably shifting its bargaining stance regarding union security, and by unilaterally instituting a wage increase. These contentions are devoid of merit, as we now show.

A. The Board properly found that the Company did not violate the Act by refusing to disclose its financial records since the Company did not plead an inability to meet the Union's monetary demands

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the designated representative of his employees. To bargain collectively is defined in Section 8(d) as meeting at reasonable times to confer in good faith with respect to wages, hours, and the terms and conditions of employment.

The statutory bargaining duties imposed by the Act require employer disclosure of certain information about unit employees, such as wage rates and the cost of fringe benefits, which is presumptively relevant and necessary to a union's negotiation of a contract. *N.L.R.B. v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (C.A. 2, 1951). Accord: *N.L.R.B. v. Whitin Machine Works*, 217 F.2d 593, 594 (C.A. 4, 1954), cert. denied,

349 U.S. 905 (1955).[6] However, an employer's statutory duty to disclose information about its own financial condition is significantly different. A union has no statutory right to an employer's financial records merely because such information might be "helpful" to the union in tailoring its wage demands to what the employer might reasonably pay. See *C-B Buick, Incorporated v. N.L.R.B.*, 506 F.2d 1086, 1091 (C.A. 3, 1974); *Pine Industrial Relations Committee, Inc.*, 118 NLRB 1055, 1061 (1957), enforced *sub. nom. International Woodworkers of America v. N.L.R.B.*, 263 F.2d 483, 484-485 (C.A.D.C., 1959); *United Furniture Workers of America v. N.L.R.B.*, 388 F.2d 880, 882-883 (C.A. 4, 1967). The Board's duty is to determine whether the obligation of good-faith bargaining has been met; it has no mandate to establish "ideal" bargaining conditions. *Pine Industrial Relations Committee, Inc., supra*, 118 NLRB at 1061. See Bartosic & Hartley, "The Employer's Duty to Supply Information to the Union, etc.," 58 Cornell L. Rev. 23, 29-42 (1972).

Early in its history, the Board held that an employer's bald assertion of poor financial condition in response to collective bargaining proposals by a union without submitting proof or permitting independent verification is not "collective bargaining" within the meaning of Section 8(a)(5) of the Act. *Pioneer Pearl Button Co.*, 1 NLRB 837, 842-843 (1936). This is so because under the Act an employer who is unwilling to modify his initial opposition to a wage increase is "obliged to furnish the Union with sufficient information to enable the latter to understand and discuss intelligently the issues raised by the [employer] in opposition to the Union's demands." *Southern Saddlery Co.*, 90 NLRB 1205, 1207 (1950).

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[6] An employer is also required to disclose relevant information needed by a union for the effective administration of an agreement. *Prudential Insurance Company of America v. N.L.R.B.*, 412 F.2d 77, 83-84 (C.A. 2, 1969), cert. denied, 396 U.S. 928; *Fafnir Bearing Co. v. N.L.R.B.*, 362 F.2d 716, 719-721 (C.A. 2, 1966).

Accord: *N.L.R.B. v. Jacobs Mfg. Co.*, 196 F.2d 680, 683 (C.A. 2, 1952); *General Electric Co. v. N.L.R.B.*, 466 F.2d 1177, 1184 (C.A. 6, 1972).

The Supreme Court sustained the Board's position in *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). There, the union requested a 10-cent-per-hour wage increase. The employer offered a flat 2.5 cent increase which it steadfastly adhered to, claiming that it "could not afford" to pay more and that a larger increase "would put it out of business." 351 U.S. at 150. When the union requested substantiation of these claims, the employer refused. The Court (per Justice Black) stated (351 U.S. at 152-153):

> In their effort to reach agreement here both the union and the Company treated the Company's ability to pay increased wages as highly relevant . . . . Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

Accordingly, with the *caveat* that each case "must turn upon its particular facts," the Court upheld the Board's finding that the employer "did not bargain in good faith. . . ." 351 U.S. at 154. Accord: *N.L.R.B. v. Jacobs Mfg. Co., supra*, 196 F.2d at 683 (employer met twice with the union and then refused to confer further, adamantly insisting that discussion of wage increases was futile because of a decline in sales and a poor outlook for the future, yet refused to substantiate its claims); *N.L.R.B. v. Bagel Bakers Council of Greater New York*, 434 F.2d 884, 887-888 (C.A. 2, 1970), cert. denied, 402 U.S. 908, and cases there cited (employer demanded a 40 percent reduction in labor costs on the ground that it was losing money because of increased competition, but refused to prove the accuracy of

its claimed need for a massive rollback); *N.L.R.B. v. Unoco Apparel, Inc.*, 508 F.2d 1368, 1369-1370 (C.A. 5, 1975) (the employer adamantly refused to even consider altering its current pay scale, alleging that the employees "came to the wrong well . . . the well is dry," while also refusing to disclose substantiating financial data); *United Steelworkers of America, AFL-CIO, Local 5571 v. N.L.R.B.*, 401 F.2d 434, 435-436 (C.A.D.C., 1968), cert. denied, 395 U.S. 946 (the employer refused to meet the union's requested wage increase because it could not do so and "remain competitive" since the cost of doing business had increased "alarmingly"); *N.L.R.B. v. Taylor*, 338 F.2d 1003 (C. A. 5, 1964) (employer refused to substantiate claim that granting union's requested wage increase meant it could not "exist"). As these cases show, an employer violates its statutory duty to bargain by adhering to the intransigent position that it is financially unable to raise or maintain wages while at the same time refusing to make any reasonable effort to support or justify its position, thus erecting an insurmountable barrier to a successful conclusion of bargaining.

Applying these principles, the Board properly found that the Company did not adamantly oppose wage increases on an inability-to-pay basis while refusing to divulge information which would allow the Union to bargain intelligently about the claims the Company made. Instead of taking an intransigent position which would either produce a clear wage stalemate or require total Union capitulation to reach agreement, the Company raised its wage offer at the same meeting that it first declined to show its books, and continued to raise its wage offers thereafter. President Cooper never told Union negotiators that the Company could not afford to pay the Union's demands, and the Union conceded that Cooper never claimed that "business was bad" or that the Company could not afford to pay more (A. 111a, 203a). Rather, Cooper simply stated that his desire to maintain a "proper balance" for his business did

not permit him to "reach the Union's numbers," and advised the Union that its proposal was "steep," and that the "numbers" Cooper favored were "around the 10 percent area" (A. 101a).[7] On the basis of this evidence, the Board could properly conclude, as it did, that this was "not the kind of an 'inability to pay' claim" which the Company, in the attendant circumstances, was required to document under *Truitt* (A. 16a).

The Union contends (Br. 10-11) that the Company's statements here regarding maintaining "proper balance" were the "functional equivalent" of claiming an inability to pay. This argument is without merit. The record shows that Cooper's oft-repeated phrase was not a "virtual insistence on a prejudgment that no agreement could be reached" (*N.L.R.B. v. Jacobs Mfg. Co., supra,* 196 F.2d at 683) but rather was simply a "favorite expression" (A. 77a) which, when considered in context, did not convey the meaning the Union seeks to ascribe to it. Significantly, although Cooper used the phrase "constantly" (A. 111a), the Union never asked him to explain what he meant, but instead lapsed into a mechanistic request for supporting data.

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[7] Although the Union never asked Cooper to explain the term "proper balance," Cooper testified at the hearing that (A. 190a):

> Proper balance is that I could have my business grow the way it has been accustomed to growing, I could reinvest whatever monies or profits we make to buy new equipment, because my business depends on it, to continually to [sic] do the advertising that we do [,] to live in the same fashion that I am accustomed to living in, to draw the same salary . . . .

Cooper understandably made his first offer low because, as he explained, "that is where I am going to start, and I'm trying to buy from [the Union] a package as cheaply as I possibly can" (A. 185a). Over the next few months, while reiterating that the Union's numbers were "too steep," Cooper progressively raised his wage offer from 2 percent to 5 percent, the latter being the figure the parties agreed to on June 19. The Company's give and take on the wage issue stands in sharp contrast to the employer intransigence evidenced in *N.L.R.B. v. Truitt* and cases cited *supra*, pp. 12-13. Cooper's conduct here is nothing more than legitimate hard bargaining, and it "is elementary that firmness of a bargaining position does not constitute bad faith." *Dallas General Drivers, W. & H., Local No. 745 v. N.L.R.B.*, 355 F.2d 842, 844 (C.A.D.C., 1966). Accord: *Chevron Oil Co., Standard Oil Co. of Tex. Div. v. N.L.R.B.*, 442 F.2d 1067, 1072-1074 (C.A. 5, 1971). As the Court stated in *United Fire Proof Warehouse Co. v. N.L.R.B.*, 356 F.2d 494, 498 (C.A. 7, 1966):

> If the employers claimed that they were unable to pay, the Union had a right to be shown evidence of inability. But when the employers refused to pay, the Union knew all it was entitled to know. In such a situation, further financial information from the employers' records would be interesting and perhaps useful to the Union, but not required; for such information cannot convert stubborn resolution into an excuse for failure to grant a wage increase . . . .

The Supreme Court made clear in *N.L.R.B. v. Truitt, supra,* that even where economic inability is raised as an argument against increased wages, it does not "automatically follow" that the employees are entitled to substantiating evidence. Each case "must turn upon its particular facts." 351 U.S. at 153. The inquiry "must always be whether or not under the circumstances of the particular case the statutory obligation

to bargain in good faith has been met." 351 U.S. at 153-154. We submit that the Board did not abuse its discretion in concluding that the Company met its statutory obligation here.

B. The Company's bargaining shift regarding union security is fully explained and does not indicate a determination to avoid reaching agreement in violation of the Act

In *N.L.R.B. v. Patent Trader, Inc.*, 415 F.2d 190, 197 (C.A. 2, 1969), modified in other respects, 426 F.2d 791, this Court set forth basic principles regarding good faith bargaining. The Court noted that although the employer's duty to bargain in good faith "does not require the yielding of positions fairly maintained" (citing *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 231 (C.A. 5, 1960)), more is required than mere "surface bargaining." *N.L.R.B. v. Patent Trader, supra*, 415 F.2d at 197. Thus, whether the Company's bargaining with regard to union security indicates bad faith depends on a determination of motive (*N.L.R.B. v. National Shoes, Inc.*, 208 F.2d 688, 691 (C.A. 2, 1953)) which must be deduced from the "totality of the circumstances." *N.L.R.B. v. General Electric Co.*, 418 F.2d 736, 756 (C.A. 2, 1969), cert. denied, 397 U.S. 965, rehearing denied, 397 U.S. 1059.

As set forth in the Counterstatement, when agreement on financial matters was not reached at the first negotiating session in which they were discussed, the parties turned to other contract terms. Cooper told the Union that he "might agree" to a union security clause if and when financial agreement was reached, and at the end of the meeting signed a one-page statement that the Company agreed "in principle" to a union security clause and 34 other items (A. 206a). Two days later, Cooper congratulated the Union on its negotiating ability and advised that his brothers thought he had "given away the Company" by agreeing in principle

to so many recommendations. Cooper stated that he was able to persuade his brothers to go along with the agreements reached with one exception: union security, a "most important issue" which Cooper had "thought out" further, was to remain "an open issue until we reach agreement on the economics" (A. 210a).

The Union argues (Br. 5, 13-14) that the parties reached an unconditional and binding written agreement on a union security clause on January 16 which Cooper ineffectively "attempted to rescind" on January 18. This contention is supported neither by the record nor by applicable law. It is clear that Cooper agreed on January 16 to a union security clause "in principle only" with the "idea" that any final agreement might incorporate the language the Union suggested (A. 173a, 177a, 206a). It is also abundantly clear that on January 16 the parties had *not* reached final agreement on all terms of a collective bargaining contract; indeed, it was only at that meeting that they began to narrow the issues in dispute. The question here, of course, is not whether the Company's preliminary acceptance of one contractual clause can or cannot be "rescinded," but rather whether the Company's subsequent modification of its tentative agreement evidences bad faith bargaining.[8] The Board properly found (A. 18a) that the Company's conduct disclosed no "unexplained shift" in bargaining position which might indicate an employer determination to avoid

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[8] There is no contention here that the Company violated Section 8(a)(5) by repudiating and refusing to be bound by the terms of a collective bargaining contract previously agreed to by the parties. Compare *N.L.R.B. v. M & M Oldsmobile, Inc.*, 377 F.2d 712, 715-716 (C.A. 2, 1967).

reaching agreement. Cooper's position during the early bargaining session was that he "might" agree to a union security clause once financial agreement was reached; his letter to the union two days later, written after thinking the matter over and discussing it with his brothers, was fully consistent with that position. Cooper's prompt clarification of the Company's stance negates any allegation that the Union was misled by the Company's tentative agreement "in principle" or that the Company's revision of its bargaining position was not made in good faith. Cf. *American Seating Company of Mississippi v. N.L.R.B.*, 424 F.2d 104, 107-108 (C.A. 5, 1970).

The Union also argues (Br. 14) that the company's refusal to agree to a union security clause in June, after agreement was reached on monetary issues, represents an unlawful refusal to bargain. However, the record shows that Cooper's refusal to agree to the union's standard union security language in June was entirely justified by intervening events – namely, the refusal of 18 out of 24 employees to join the Union's strike, and their statements to Cooper "one by one" that they wanted "nothing to do" with the Union (A. 160a). See *Caroline Farms Division of Textron, Inc. v. N.L.R.B.*, 401 F.2d 205, 211 and n. 7 (C.A. 4, 1968). According to Cooper, he "couldn't see forcing anybody to pay dues . . . to . . . any organization if the people themselves didn't want to" (A. 161a-162a). Moreover, Cooper continued to bargain on the issue of union security for six more sessions, and offered a maintenance of membership clause which the Union rejected. See *supra*, pp. 8-9. It was clearly within the Board's discretion to conclude that the Company's bargaining regarding union security was conducted in good faith and not with the purpose of frustrating collective bargaining.

C. After negotiations reached an impasse, the Company lawfully instituted a wage increase it had previously offered the Union

The collective-bargaining requirements of the Act impose upon both the employer and the employees' representative the duty to meet and confer in "good faith" (Section 8(d)). This duty, however, does not compel a party "to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). Indeed, "[w]here goodfaith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock, the Board is warranted, see *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 [(1965)] . . . and perhaps sometimes even required, cf. *N.L.R.B. v. Intracoastal Terminal, Inc.*, 286 F.2d 954 (C.A. 5, 1961) to make a determination that an impasse existed." *Dallas General Drivers, W. & H Local No. 745 v. N.L.R.B., supra*, 355 F.2d at 845. Under such circumstances, the employer is free to institute unilateral changes, so long as they are not substantially different from those which the employer has proposed during negotiations. *N.L.R.B. v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949); *American Federation of Television & Radio Artists v. N.L.R.B.*, 395 F.2d 622, 624 (1968), affirming *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967); *N.L.R.B. v. King Radio Corp.*, 416 F.2d 569, 571 (C. A. 10, 1969), cert. denied, 397 U.S. 1007. See also, *Firch Baking Company v. N.L.R.B.*, 479 F.2d 732, 735 (C.A. 2, 1973), cert. denied, 414 U.S. 1032.

On this record, the Board was clearly justified in finding that the parties had reached an impasse on October 12, and thus that the Company could lawfully implement the wage increase that it had offered and the Union had accepted on June 19. The parties met in 21

bargaining sessions, freely exchanged bargaining proposals continuously made concessions, and by the June 19 meeting had agreed on a 5 percent wage increase and all other terms of a labor compact *except* union security. Six further meetings failed to resolve that issue: the Company rejected an agency shop provision and a modified maintenance of membership clause, and countered with its own version of a maintenance of membership clause which the Union rejected. On October 10, the Company informed the Union that its latest offer was its final one, and only after the Union rejected that offer did the Company implement the wage increase there contained. It was evident that the parties were firm in their respective positions and that there was no prospect of narrowing the gulf separating them. "It cannot be doubted that a deadlock on one critical issue can create as impassable a situation as an inability to agree on several or all issues." *American Federation of Television & Radio Artists v. N.L.R.B., supra,* 395 F.2d at 627, n. 13.

The Union apparently concedes, as it must, that the parties' positions on union security were solidified at the time of the Company's wage increase, and argues only (Br. 12) that the Company impeded agreement by improperly refusing to disclose financial records. This contention must fail. First, as we have shown *supra*, pp. 10-16, the Company's refusal to disclose financial information was entirely consistent with its duty to bargain in good faith. And in any event, the parties reached full agreement on the wage issue even though the requested financial information was not produced. Such information was in no respect relevant or pertinent to the only issue as to which the parties were at impasse – namely, the union security issue. In view of these circumstances, the contention that refusal to produce this information had any effect at all on the parties' bargaining to impasse is clearly unfounded.[9]

[9] *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 268 (C.A. 2, 1963), cert. denied, 375 U.S. 834, cited by the Union (Br. 12-13) is easily distinguished. In that case the

(continued)

As set forth in *N.L.R.B. v. Katz*, 369 U.S. 736, 747 (1962), the rationale for prohibiting unilateral action by an employer is to prevent "behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." Clearly, the Company's wage increase meets none of these criteria. The parties had bargained for months, had agreed on the wage increase in question, and had exhausted possible avenues for resolving their other differences. The Board properly found that the Company's unilateral action was not a violation of the Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition to review should be denied.

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[9] (continued) Company announced its wage increase within two days of the Union's unfair labor practice strike vote; the Court inferred from this timing that the employer's prior negotiations had been conducted in bad faith. In contrast, here the union called a strike on May 15, agreement on a 5 percent wage increase was reached on June 19, and not until October 12 did the Company institute that increase. Moreover, the Board found, and the Union does not contest, that the strike here was economic and was not caused by the Company's refusal to open its books (A. 16a n. 2, 36a). The Union's reliance on *Fitzgerald Mills* is clearly misplaced.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW YORK PRINTING PRESSMEN AND OFFSET WORKERS UNION NO. 51, INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATION UNION, AFL-CIO,	)	
Petitioner,	)	
v.	)	No. 75-4240
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board' offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 15th day of March, 1976.